

Supplemental submission on Rule 506(d), 65 P.S. §67.506(d)

No records have been requested from third-party CRIMEWATCH Technologies, Inc. (“CRIMEWATCH”). However, with regard to Section 506(d), alleged public records in the possession of third parties are accessible through that Section only if: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to the performance of that function. In addition, an agency must have a contract with the third party from whom records are sought under Section 506(d). *See Sandler v. City of Pittsburgh*, Docket No. 2019-0215. The Pennsylvania Supreme Court has interpreted the governmental function requirement as connoting an act of delegation of some “substantial facet” of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors. *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012). A “third party performs a governmental function on behalf of an agency where it performs ‘a function generally performed by that agency and is not ancillary to the agency’s functions.’” *Sandler* at page 11.

Putting aside, for the moment, the issue of whether the requested information is exempt as trade secrets and/or confidential proprietary information, which it is, CRIMEWATCH merely provided a computer program and platform to Harrisburg P.D. and does not perform any governmental function on behalf of the Harrisburg P.D. *See CRIMEWATCH Affidavits and submission*. The Harrisburg P.D. simply did not delegate an essential governmental function to CRIMEWATCH. Technology such as the “ShotSpotter software” in *Sandler v. City of Pittsburgh*, Docket No. 2019-0215, collected gunshot information that could be used as actual evidence in a criminal case, i.e., it detected the origination of gunfire and related information in *real time*. Although the CRIMEWATCH platform provides for the possibility of real time engagement between law enforcement users and the public, the CRIMEWATCH system does not yield real time data and evidence such as a police officer might gather during the performance of his or her field duties—if a tip were provided the police would still have to investigate the allegations contained in the tip. *See CRIMEWATCH Affidavits*. Moreover, a crucial purpose of the technology is to offer individual citizens access to public safety information so as to protect themselves from potential dangers in the community—this purpose has nothing whatsoever to do with assisting law enforcement in criminal investigations.

Assuming, *arguendo*, that the OOR determines that the CRIMEWATCH software is utilized to aid or assist criminal investigations---an essential governmental function of the Harrisburg P.D.---because the public provides tips and information through the CRIMEWATCH platform, the requested software training materials---which Harrisburg P.D. does not possess---do not “directly relate” to the performance of criminal investigations. Unlike the “ShotSpotter locations” and software used by the City of Pittsburgh Police Department to obtain information about gunshots fired in the City of Pittsburgh, software training information simply does not “directly relate” to the actual performance of an essential governmental function, that of criminal investigations conducted by the Harrisburg P.D. *See Sandler v. City of Pittsburgh*, Docket No. 2019-0215.

Stated another way, the CRIMEWATCH software training materials have nothing at all to do with the act of performing criminal investigations and are ancillary thereto. The Harrisburg P.D. conducts investigations according to their own training and protocols, independent of CRIMEWATCH and its platform. Training records for a software platform, and the software training itself, do not directly relate to the performance of the Harrisburg P.D.'s primary governmental function, that of conducting criminal investigations, and software training would be ancillary thereto because such training does not fulfill a core purpose of a governmental agency and is not a substantial facet of the agency's roles and responsibilities. Although Harrisburg P.D. is required to investigate crime, the completion of CRIMEWATCH software training is clearly an ancillary function of the Harrisburg P.D. CRIMEWATCH employees were not subject to the Harrisburg P.D.'s control or direction when they provided the platform and have not been conferred with agency status by the Harrisburg P.D. in any respect; the Harrisburg P.D. paid for a software license and is permitted to use the CRIMEWATCH platform, nothing more, nothing less. *See Kelly v. Northeastern Educational Intermediate Unit*, 36 Pa. D&C. 5th 300 (Lackawanna 2014) (accounting firm that completes audit of local agency does not perform a governmental function on behalf of agency under RTKL as completion of statutorily required audit is an ancillary function of agency). CRIMEWATCH is not performing any function generally performed by the Harrisburg P.D.

If the OOR were to determine that such training materials do directly relate to the performance of criminal investigations and are not ancillary to such essential governmental function, then the information requested would be exempt under 65 P.S. 67.708(b)(16) as relating to Harrisburg P.D. criminal investigations. Thus, to the extent that the requested records could or do directly relate to criminal investigations, the records are either exempt as criminal investigation material (records relating to or resulting in a criminal investigation) or the OOR lacks jurisdiction to consider the merits of this appeal. *See Sandler*.

Under the circumstances, CRIMEWATCH respectfully requests that the Appeal of J. Ader be denied.

Respectfully submitted,
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